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COMMITTEE FOR PUBLIC COUNSEL SERVICES
TRAINING UNIT
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I. INDIGENT DEFENSE NEWS

REQUEST FOR PROPOSALS FOR PROVISION OF LEGAL SERVICES TO INDIGENTS IN DUKES COUNTY

The Committee for Public Counsel Services is accepting proposals from attorneys who wish to organize, coordinate and provide legal services in the Edgartown District Court from October 1, 2003 - September 30, 2004

Attorney coverage is needed in the Edgartown District Court every day throughout the year; provision for conflict counsel and on-call counsel is also required. Attorney coverage is also needed for two juvenile dates per month on Martha's Vineyard, and approximately thirteen weeks of jury sessions per year. Statistics regarding the number of assignments in the Edgartown District Court for prior fiscal years are being prepared and will be available by mail or FAX upon request.

We would like to decide on a delivery system and have it begin operating October 1, 2003 through September 30, 2004. Any Attorney interested in coordinating and providing services must send a written proposal **on or before September 1, 2003** to:

Helen Fremont
Staff Counsel
44 Bromfield Street
Boston MA 02108

For a copy of the guidelines for submission of a written proposal, please call Betty Ann Linfield at (617) 988-8332.

REQUEST FOR PROPOSALS FOR PROVISION OF LEGAL SERVICES TO INDIGENTS IN NANTUCKET COUNTY

The Committee for Public Counsel Services is accepting proposals from attorneys who wish to organize, coordinate and provide legal services in the Nantucket District Court from October 1, 2003 - September 30, 2004

Attorney coverage is needed in the Nantucket District Court every day throughout the year; provision for conflict counsel and on-call counsel is also required. The Nantucket Court sits one day per week in the winter, spring and fall and two days per week in the summer. On-call coverage must be provided for the other days. Attorney coverage is also needed for one juvenile date per month on

Nantucket, and jury sessions three days a week every other month. Statistics regarding the number of assignments in the Nantucket District Court for prior fiscal years are being prepared and will be available by mail or FAX upon request.

We would like to decide on a delivery system and have it begin operating October 1, 2003 through September 30, 2004. Any Attorney interested in coordinating and providing services must send a written proposal **on or before September 1, 2003** to:

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II. MESSAGE FROM THE CHIEF COUNSEL

This has been a terrible summer, hasn't it? So soon after being showered with society's accolades as constitutional heroes and defenders for the rights of poor people on the occasion of the 40th anniversary of the Gideon decision in March, we find ourselves facing a multitude of very grim budget realities in the summer heat. (1) CPCS staff and Bar Advocate operations were subjected to a third consecutive reduction in the FY04 budget, a total of almost $800,000 this year and more than $2 million over three years, to what had been a $17.4 million budget in FY01. This means fewer and fewer pubic defenders and staff attorneys to provide full-time representation, no relief from unconscionably low salaries, and further cuts in Bar Advocate funding. (2) Assigned private counsel, who already suffer among the lowest hourly compensation in the country at $30 per hour for most CPCS assignments and $39 for the remainder (except murder cases) not only saw those rates remain stagnant for yet another year, but watched in frustration as Governor Romney vetoed $13 million in counsel compensation and $2 million in indigent court cost vendor fees from the FY04 appropriation, and the Legislature went into recess without overriding those vetoes, or approving the Governor's request for $14.5 million to pay them and the vendors for required services which they provided last fiscal year. (3) Finally, the Governor inexplicably vetoed outside section 690 of this year's budget, which, without cost, establishes a commission comprising representatives of the Legislature, the Judiciary, CPCS, the Mass. Bar Association, and the Mass. Association of Criminal Defense Lawyers, to study both indigency standards and the compensation paid to counsel for the indigent, with direction to propose legislation in November, 2003; and this veto too has not yet been overridden.

The anger that this inattention and neglect has aroused in lawyers who enforce the Constitution and the Law by representing the poor for such inadequate compensation has recently been evident in a steady drain of experienced staff attorneys and private counsel away from CPCS employment and certification lists, in the refusal by some attorneys to accept new assignments, and in at least one pending lawsuit. Please remember: the solution to the indigent counsel crisis lies in the hands of Governor Romney and your elected Senators and Representatives.

The Committee for Public Counsel Services, after examining the rates paid in comparable jurisdictions, voted unanimously in December, 2002 to establish hourly rates of $60 for the majority of CPCS cases (e.g., District Court criminal), $90 for most of the remainder (e.g., Care and Protection, Superior Court Criminal, SDP, SORB), and $120 for the small number of murder cases. It is only because, by law, these rates are "subject to appropriation," that they cannot be unilaterally put into effect.

Likewise, CPCS has long proposed that its staff attorney salaries begin at the "Counsel I" level (currently over $43,000 per year, compared to our $35,000) at which almost all state-employed lawyer salary levels begin. Only CPCS attorney, assistant district attorneys, and assistant attorneys general–whose work is certainly the most demanding and most important lawyering done by any Commonwealth attorneys, without exception–are singled out for below public sector wages.

Both these forms of financial discrimination cry out for remedial action. Assigned private counsel deserve to be paid comparably to counsel who represent poor people in similar jurisdictions; and CPCS staff attorneys deserve salaries commensurate with other attorneys employed by the Commonwealth of Massachusetts. To date, we have failed to convince Governor Romney and our legislators to remedy these gross injustices. Every one of us has an obligation to urge the correction of this injustice upon our Governor, our Representative , and our Senator, regularly and persuasively; and to continue our respectful advocacy until we achieve the goal of adequate compensation for those who keep the right to counsel alive in Massachusetts. Please be assured that we at the Committee for Public Counsel Services will not rest until this goal has been accomplished.

III. CASENOTES

The following casenotes summarize decisions released in February, March, and April, 2003. The Casenotes were written by Carlo Obligato, Esq., of the CPCS Appeals Unit. We are grateful for his time, hard work, and contribution. (Always Shepardize, and check for any modifications by further appellate review.)

Please note: the case name appearing in boldface indicates a reversal.

ADMISSIONS & CONFESSIONS: *Miranda* warnings relative to license to carry a gun. *Commonwealth v. Haskell*, 438 Mass. 790, 795-796 (2003).

(police officer need not have administered *Miranda* warnings before demanding that a suspect in custody produce a license to carry a firearm; however, suppression was required where the officer instead, after stopping the defendant and without first advising him of his *Miranda* rights, asked him whether he had a license to carry a firearm)

The officer did not order the defendant to produce or exhibit a license to possess the revolver found in his car. Such a demand is tantamount to requiring the suspect to produce real or physical evidence and does not violate the proscriptions against self-incrimination. The problem in this case is that the officer instead, asked the defendant whether he had such a license. "As subtle as this distinction may seem, [the officer's] question was an invitation to 'relate a factual assertion or disclose information, ' . . . , specifically, an admission that he was in violation of G. L. c. 140, § 129C. It was therefore a request for a testimonial communication that entitled the defendant to the Fifth Amendment's protections, including the right to refuse to answer Id. at 796, quoting *Doe v. United States*, 487 U.S. 201, 210 (1988).

The fact that the stop in this case, and the safety precautions taken to effect it, fell within the permissible limits of a *Terry* stop was not dispositive of whether the questioning was "custodial" for *Miranda* purposes. Justifiable safety precautions, such as handcuffing a suspect and approaching with drawn weapons, may create a level of coercion equivalent to formal custody without transforming the *Terry* stop itself into an arrest. Thus, that the restraints imposed on the defendant were permissible as part of a *Terry* stop did not contradict the Court's assumption that the officer's question to the defendant constituted custodial interrogation Id. at 795 n.1.

ADMISSIONS & CONFESSIONS: *Miranda* warnings, a mere "formality."

Commonwealth v. Gaboriault, 439 Mass. 84 (2003)

(recitations of *Miranda* warnings were not rendered inadequate by the officer characterizing them as a "formality," nor did this, in conjunction with his past relationship with the defendant, create a coercive environment that eviscerated the voluntariness of the defendant's confession)

After the defendant's 18-year-old girlfriend left him and took their infant son with her, he enticed them back home and then fatally stabbed them both. Upon being taken into custody, the defendant was given his Miranda warnings and indicated that he wanted to give a statement regarding the murders. At the station, he was again given the warnings. However, just before this, the officer, whom the defendant knew, referred to them as "just a formality" Id. at 87. The defendant signed the Miranda form, stated that he understood his rights, and was willing to speak. However, the video camera in the interrogation room was not functioning properly and the interrogation was moved to another room, where the defendant was once again advised of his rights immediately before giving his full statement. In all, he received his Miranda warnings three times prior to the videotaped confession in which he admitted to stabbing the victims.

The Court held that the circumstances surrounding this interrogation, taken as a whole, demonstrated that the use of the word "formality" did not render the Miranda warnings constitutionally inadequate. The defendant was given Miranda warnings three times, and on each occasion, indicated a willingness to speak with the officer. He also signed a Miranda card. He also never asked for an attorney or whether he could make a telephone call. Additionally, he was given more time to reflect on his waiver because of the malfunctioning video equipment. "Although any use of words that characterize or minimize a suspect's Miranda rights should be avoided, [the Court] agreed that in this situation, using the word "formality" did not coerce or mislead" Id. at 88.

ADMISSIONS & CONFESSIONS: Voluntariness of statement.

Commonwealth v. Jordan, 439 Mass. 47, 49-53 (2003)

(in a prosecution for murder, defendant's incriminating statements to Boston police detectives were neither made under the protection of a letter of immunity from Federal authorities for whom the defendant was working as a drug informant nor were the statements the product of police deception).

The Federal "proffer immunity" in this case explained that if the defendant told the truth nothing he said could be used against him directly. However, the state detectives had no authority to enter such an agreement, did not sign the letter, and believed that it had no application to proceedings in State court. The defendant was duly informed that he was a suspect in the murder and that the state could not offer him any inducements or make any promises. He then gave a story that he thought would not be self-incriminating: He denied being involved in the shooting but admitted being present at the time it occurred, being armed, and being in the company of the person who he claimed actually shot the victim Id. at 49.

ADMISSIONS & CONFESSIONS: Voluntariness & *Doyle* error.

Commonwealth v. Caputo, 439 Mass. 153 (2003)

(Defendant's statement was not involuntary where, when he was given his *Miranda* warnings and indicated that he did not wish to speak to the police, all questioning ceased, but after he overheard a telephone conversation that tended to implicate him, he then made a statement)

The defendant was first informed of his rights inside his house when the police informed him that they were investigating a double homicide. After he indicated that he understood them, he said, "I think it best if I don't say anything at this time." Questioning ceased immediately. However, a short time later, as

he overheard a telephone conversation between two officers regarding the status of the investigation, he spontaneously stated, "I don't want to incriminate myself, but I have something to say about last night." He told the officers that the night before, two men had forced their way into his home, kidnapped him, and that he had awoken "in a daze" in the Braintree area, wearing only his underwear. The police did not question him Id. at 159. He then agreed to go to the police station. There, he was once more advised of his rights, and provided with a written copy of them. Asked whether he wished to talk to the police, the defendant replied, "I'm not sure, I don't know if I should say anything or not. What should I do?" An officer responded, "I can't tell you that, but I want you to be aware of your rights and that you do not have to say anything to me." After being informed of his rights yet again, the defendant elaborated on his earlier statement.

The Court rejected the argument that the officer's use of the defendant's telephone was "reasonably likely to elicit an incriminating response" and therefore the "functional equivalent" of an interrogation Id. at 160. The defendant's statement occurred only after and apparently because he had overheard the telephone conversation that tended to implicate him, not because of any "interrogation" Id. at 161.

The Court did agree that it was error for the prosecutor in his opening statement to direct the jury's attention to the defendant's invocation of his right to remain silent Id. at 165, see *Doyle v. Ohio*, 426 U.S. 610 (1976), and it was error to elicit on direct examination from an officer the defendant's response that "he thought it best if he didn't say anything at the time" Id.. at 165-166. However, in light of the curative instructions given to the jury, and the overwhelming evidence of the defendant's guilt, the prosecutor's improper comments and question did not cause a substantial likelihood of a miscarriage of justice Id. at 166-167.

ADMISSIONS & CONFESSIONS: Ambiguous waiver.

Commonwealth v. Jones, 439 Mass. 249, 254-259 (2003)

(defendant's statement that he was "going to need a lawyer sometime," did not constitute an affirmative request for an attorney)

The victim's sister and her female friend formulated a plan to kill the victim after they discovered that the victim was having a relationship with their boyfriends, which included the defendant, who was the sister's boyfriend. The defendant strangled the victim with a bicycle chain but claimed that the murder was in the heat of passion, not premeditated.

When the police questioned the defendant about the victim's disappearance, he agreed to speak with them and told them that he had an argument with the victim, and that she left his house. Two days later, the defendant was again advised of his rights. The police told him that the victim's sister and her friend had implicated him in the victim's death. The defendant continued to deny any involvement. After a break in the questioning, it resumed and the defendant said, "I'm going to need a lawyer sometime." The officer responded that he was entitled to a lawyer, and that there was an assistant district attorney down the hall who would get him a lawyer. The defendant stated that he had no money and could not afford one. The officer stated that he did not need any money, and that the State would provide him with a lawyer because it was his constitutional right. The defendant looked directly at the officer and "shook his head in the negative." About twenty minutes later, he gave the officer a "free-flowing narrative" of the murder Id.. at 255-256.

The Court, repeating that "equivocal statements and musing concerning the need for an attorney do not constitute . . . an affirmative request" for one (citations omitted)," agreed with the motion judge that what occurred here did not constitute an affirmative request for an attorney Id. at 258-259. Furthermore, the confession benefited the defendant at trial. Absent the confession, defense counsel had no basis for arguing that the defendant did not act pursuant to the plan, and that he "had an argument, and

during the course of the heat of that argument is when [the victim] was killed." Id. at 259.

ADMISSIONS and CONFESSIONS: Comment by prosecutor.
Commonwealth v. Andujar 57 Mass. App. Ct. 529, 532-535 (2003)
(See also EVIDENCE: Opinion testimony)
(prosecutor improperly commented on defendant's right to remain silent)

$ 375 was found in the defendant's pocket upon his arrest. On cross-examination of the police officer, defense counsel sought to create the innuendo that the money might have been intended for rent and had its source in a social security check rather than drug sales. The prosecutor's redirect took the following tack: "[When you found the money on the defendant,] did he offer you any explanation why he had so much cash on him?" See Id.. at 534-535 for additional details.

Such an inquiry should not have been undertaken by the prosecutor or allowed by the trial judge. The defendant was under arrest at the time referenced. Any questioning at that juncture required Miranda warnings. The defendant made no statements when the police discovered the cash in his pockets at his arrest. The prosecutor's redirect examination impermissibly suggested that the defendant had an obligation to make an explanatory statement. Such a suggestion directly implicates the defendant's core constitutional right to remain silent. That the prosecutor's questioning occurred on redirect examination is of no consequence. Use of the defendant's post-arrest silence to impeach an exculpatory explanation offered by defense counsel on cross-examination is prohibited. Even when confronted with defense questioning that is argumentative or otherwise improper, the prosecutor may not imply that the defendant has an obligation to explain. In sum, this impermissible comment upon the defendant's right to remain silent, taken together with the erroneous admission of the officer's opinion that he had observed street level drug transactions, created a substantial risk of a miscarriage of justice.

ADMISSIONS and CONFESSIONS: Article 36 of the Vienna Convention
Commonwealth v. Diemer, 57 Mass. App. Ct. 677, 681-687 (2003)

Defendant, a German national, convicted as an accessory after the fact to murder, argued that his statements to police should have been suppressed for failure to comply with Article. 36 of the Vienna Convention on Consular Relations which entitles a foreign national to be advised of his right to have his consulate notified, without delay, of his detention and to thereafter communicate with the consular. Although the judge found that there had been a violation of the notification provision of the treaty (but no violation of his *Miranda* rights), the treaty is silent as to the remedy -- no express language contemplates suppression. Where the "loquacious" defendant failed to show how he was prejudiced, the Court declined to find the "judicially created" exclusionary rule to be the appropriate sanction. See *Breard v. Greene*, 523 U.S. 371, 376 (1998) (capital case in which question whether Article 36 confers "individual rights" which are privately enforceable, was tangentially raised).

CRIMES: Homicide; insanity, G.L. c. 278, sec. 33E.
Commonwealth v. Cook, 438 Mass. 766 (2003)

The defendant shot a police officer who came to his door to deliver a parking permit to use during an upcoming street event. A short time later, while first aid was being applied to the victim, the defendant kicked him in the head and said, "He's only faking." The defense was insanity.

The defendant held degrees in law and criminal justice and had served in the military. In 1993, he was diagnosed as suffering from paranoid schizophrenia. He thought inanimate objects were animate. For example, he would put food in his hair, saying it needed food. He threw away his medicine. He would sometimes leave his apartment barefoot and in dirty clothes and he rarely bathed. He would also

play basketball by himself, without shoes, for "all hours of the night." On the day of the killing, despite it being eighty-five degrees outside, he was in his apartment with the oven door open and the stove turned on high.

At various times following his arrest, seven experts evaluated the defendant, and all testified that he was mentally ill Id.. at 771. Psychiatrist Martin Kelly (notorious for testifying as a prosecution expert and finding practically everyone sane no matter what the circumstances), opined that the defendant's schizophrenia caused him to lack the capacity to conform his conduct to the requirements of the law.

The Commonwealth did not produce any experts to testify to the defendant's criminal responsibility Id.. at 771. The Court, citing *Commonwealth v. Monico*, 396 Mass. 793 (1986), stated that there is no requirement that it do so. *Monico*, however, stands for the proposition that "[e]xpert psychiatric testimony is not necessary to raise the issue of insanity as a complete defense" Id.. at 798.

In affirming the jury's verdict of murder by extreme atrocity or cruelty, the *Cook* Court did not mention, let alone distinguish its decision in *Commonwealth v. Giuliana*, 390 Mass. 464 (1983). In *Giuliana*, the Court reversed the defendant's conviction of murder in the first degree as against the weight of the evidence. Giuliana introduced extensive lay testimony as to the his bizarre behavior before, during, and after the killing as well as the testimony of four expert witnesses demonstrating that he was insane. The Commonwealth failed to support with any expert testimony its theory that Giuliana's actions were the result of voluntary ingestion of drugs.

CRIMES: Motor vehicle; Community caretaking function

Commonwealth v. McDevitt, 57 Mass. App. Ct. 733, 736-738 (2003)

(a police officer could properly conduct a "well-being" check of a vehicle stopped in the breakdown lane even though the officer had previously received tips that the same car was driving erratically and the officer had already commenced an investigatory search for the car: The community caretaking function encompasses concern for the safety of the public using the roadway as well as concern for the safety of the suspected vehicle's occupant(s))

DEFENSES: Insanity; diminished capacity.

Commonwealth v. LaCava, 438 Mass. 708, 712-716 (2003)

(trial counsel's decision to forego an insanity defense for one of diminished capacity [mental impairment] where a "serious impediment" Id. at 714, to the former was "substantial ... evidence inconsistent with an insanity defense" Id. at 716, including his own expert's opinion that he "did not satisfy the requirements for an insanity defense in that he did not suffer from a mental disease or defect" Id. at 712, but that he did not have the ability to control his conduct at the time of the shooting, Id. at 715, due to a personality disorder, depression, stress and anxiety Id. at 718, so that there was a basis for the latter defense, was not a manifestly unreasonable trial strategy)

DEFENSES: Insanity; diminished capacity.

Commonwealth v. Gaboriault, 439 Mass. 84, 90-93 (2003)

(See also ADMISSIONS & CONFESSIONS: *Miranda* warnings)

(holding that the tactic to withdraw the issue of criminal responsibility in lieu of a diminished capacity defense was not ineffective)

Trial counsel presented two expert witnesses in order to show that the defendant was either not responsible for his actions or that he suffered from a diminished capacity at the time of the murders. A psychologist was hired primarily to conduct a battery of neuropsychological tests on the defendant and to report the results to the psychiatrist, the primary defense expert witness. The latter opined that though the

tests indicated a possible organic brain disorder, the defendant was not completely lacking in criminal responsibility. In light of this, trial counsel opted for the alternative strategy of pursuing a claim of diminished capacity thereby attempting to show that at the time the defendant stabbed the victims he was "unable either to form the specific intent to kill or to premeditate" Id. at 91.

While the SJC has repeatedly stated that "there is no diminished capacity defense in Massachusetts, *Commonwealth v. Gould*, 30 Mass. 672, 683 (1980) stands for the proposition that the defense may produce psychiatric evidence that would allow a jury to consider whether the defendant lacked the mental capacity to premeditate the killing" Id. at 91. (Citations omitted).

Trial counsel faced a situation where he had experts that would testify toward a diminished capacity claim, but not lack of criminal responsibility. His tactical decision to focus on the former was therefore logical and did not deprive the defendant of an adequate defense Id. at 93.

DISCOVERY: Exculpatory evidence; failure to produce.

Commonwealth v. Healy, 438 Mass. 672 (2003)

(concluding that D was not entitled to a new trial on basis of prosecution's failure to disclose allegedly exculpatory material [a postmortem report] where prosecutor had agreed to turn over all witness statements, scientific reports and exculpatory evidence; however, there was no waiver of defendant's claim even thought it would have been possible for defense counsel to obtain the report from the hospital if he had known of its existence).

Based entirely on circumstantial evidence, but with some consciousness of guilt evidence added to the mix, the defendant was convicted of murdering the victim (found on his bed, semi-naked, bound, pants pulled down, genitals exposed and stabbed fourteen times in the chest,) in what appeared to be a homosexual encounter at the victim's apartment. See Id. at 674-675. Years later, the defendant discovered that the there was a postmortem report which indicated an absence of semen in the victim's mouth or rectum or other "signs of recent sexual activity" on the victim's body. He claimed that this undermined the Commonwealth's theory that the murder was the product of a homosexual encounter gone awry Id. at 680.

The failure to make the report available to the defendant was improper. "Justifiable reliance on the prosecutor's fulfilment of discovery obligations will not result in waiver of a claim of violation of those obligations merely because the items the prosecutor was obligated to produce could have been obtained from some other source" Id. at 678. However, the Court concluded that the defendant had not met his burden (here, the more favorable one of a "substantial basis") of showing that the report was exculpatory or material. The Court stated that "[t]here is a wide range of sexual activity, up to and including many forms of sexual assault, that leaves neither sperm nor signs of injury to sexual organs" Id. at 681. The specific form of sexual activity involved in the encounter was not an important part of the Commonwealth's case, though it helped to explain why there was so little blood on defendant's clothing. And there was plenty of other evidence regarding sexual activity, such as a pair of semen-stained undershorts near the victim. Furthermore, the defendant's closing argument did not in any way contest the inference that the attack on the victim had occurred during the course of some unidentified form of sexual activity. Thus, the Court was "confident that, even if the prosecution had supplied the report to the defendant in timely fashion, the report or available evidence disclosed by it would not have influenced the jury" Id. at 685.

The case is noteworthy to the extent that it provides a reprise of the law relating to nondisclosure of exculpatory evidence. See Id at 678-680.

DISCOVERY: Disclosure, Police inventory report.

Commonwealth v. Brown, 57 Mass. App. Ct. 852 (2003)

(Commonwealth did not withhold exculpatory and material evidence by failing to provide a police inventory report where defendant's request for "police reports" was not specific enough to place prosecutor on notice that the inventory report was being sought; moreover, defendant failed to show a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial)

The Commonwealth introduced evidence that two police officers observed the defendant break into an automobile. As they approached him, he yelled an expletive and began to flee. When they caught him, they found a radio and face plate in his hands and some controls from the dashboard in his pocket. Upon returning to the parked car, the officers saw a smashed passenger side window, a ripped out center console (where the radio would have been), a screwdriver on the ground, and broken glass around the car.

The defendant testified to a completely different version of events. He stated that he was walking down the street while listening to music through headphones connected to a "walkman" and carrying a second "walkman." Suddenly, he was struck in the head from behind, which dazed him and rendered him semi-conscious. The next thing he could remember was being handcuffed with a police officer sitting astride his back. He was put in the police cruiser and taken to the station where the same officer slammed his head into a wall several times. The defendant testified that he did not possess any of the items allegedly seized from him by the officers.

On rebuttal, both officers testified that they did not recall seeing any "walkman" or earphones or anything akin to them on Brown when they arrested him.

On surrebuttal, Brown testified that two "walkmans" were returned to him after his arraignment.

Appellate defense counsel obtained a "Boston Police Department Prisoner Disposition Form" which indicated in the section "Prisoner Personal Data," that the defendant, in fact, had "2 sets of walkman." This, he asserted, was exculpatory material insofar as it both corroborated the defendant's version of events and discredited the testimony of the police officers. He further asserted that the Commonwealth improperly withheld this evidence.

The Court held that the defendant's pretrial request for "police reports" did not, for lack of specificity, encompass the inventory report. It noted that "[e]ven if the prosecutor [had] had the inventory report in hand, it was simply not of such character as to reveal its exculpatory potential," until, that is, the defendant testified Id. at 856, and the two officers, in turn, testified that he did not have such items when arrested. Id. at 857.

In light of this, the question then became whether the defendant had shown a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial. The Court distinguished the case at bar from *Commonwealth v. Tucceri*, 412 Mass. at 413 Id. at 857-858. It essentially held that though "the inventory report corroborate[ed the defendant's] otherwise uncorroborated testimony and show[ed] that the police officers were undeniably wrong in one aspect of their testimony," Id. at 858, nevertheless, the Court concluded that "it borders on the fanciful to maintain that, on the basis of the undisclosed report, the jury would have disbelieved the police officers' essential account, buttressed by physical evidence, in favor of [the defendant's] version of events" Id. at 859.

EVIDENCE: Required finding; Joint venture

Commonwealth v. Netto, 438 Mass. 686, 700-701 (2003)

(See also SEARCH & SEIZURE: Probable cause; expectation of privacy, abandonment, and Instruction: Joint venture felony-murder)

(at a murder trial, there was sufficient evidence to submit the case to the jury on alternative theories of joint venture liability: the fact that the Commonwealth did not present evidence identifying one coventurer as the one who stabbed the victim did not preclude the Commonwealth from pursuing a theory of joint venture liability as to the second defendant)

The Commonwealth may present strong but circumstantial evidence that the defendant himself was the principal perpetrator while simultaneously presenting evidence that the crime was committed as part of a joint venture. Where a joint venture has been shown, the strength of the Commonwealth's evidence proving that the defendant was the principal perpetrator does not prevent the submission of the alternative theory of joint venture, and it would be anomalous to deprive the Commonwealth of that alternative theory merely because it also had a well-supported theory of principal liability. While the circumstantial evidence may strongly suggest which of the joint venturers was the principal perpetrator, the jury may not be convinced of the defendant's principal liability beyond a reasonable doubt. If the jury have such doubt, they may still convict if they are convinced that the elements of joint venture were proved. Here, the Court held that there was ample evidence that the defendants were joint venturers Id. at 701.

EVIDENCE: Required finding; Joint venture felony-murder

Commonwealth v. Rolon, 438 Mass. 808, 817 (2003)

(See also EVIDENCE: Vouching for credibility)

(Holding there was sufficient evidence that defendant had committed the predicate felony of armed burglary as either a principal or a joint venturer; however, it was insufficient to prove assault and battery by means of a dangerous weapon, armed assault in a dwelling and armed burglary, where the evidence was insufficient as to "principal liability" in that, as to the first two charges, there was no evidence that the defendant himself struck the victims or committed any assault while in the dwelling and where, as to the third charge, since armed burglary served as the predicate felony for a separate conviction of felony-murder, that charge was duplicative)

The case involved an incident in which a group of young armed men stormed an apartment in a New Bedford housing project in retaliation for an earlier confrontation involving some of the apartment's occupants. Three men in the apartment were stabbed in the course of the ensuing melee -- one died. The Commonwealth's theory was that the defendant was the principal instigator of the group's attack on the apartment and that he was the one who fatally stabbed the victim. The fatal stabbing, however, occurred outside the apartment. Evidence that the defendant ever entered the apartment was next to none. Nevertheless, that the victim tried to flee the premise, hence the killing occurred just outside the dwelling, was not a basis to dissociate it from the predicate felony Id. at 818-819. Where, however, as to the charges of assault and battery by means of a dangerous weapon, and armed assault in a dwelling based on the conduct of two codefendants occurring inside the apartment, which indictments were submitted to the jury on theories of both joint venture and principal liability without requiring the jury to specify whether they found the defendant guilty of these crimes based on the supportable theory of joint venture or based on the unsupportable theory of principal liability, the convictions could not stand.

EVIDENCE: Required Finding, Forgery, elements & opinion.

Commonwealth v. O'Connell, 438 Mass. 658, 662-664 (2003)

(charged with forgery, uttering, and larceny over $250, based on the theory that the defendant had forged his father's signature on five checks that he made payable to himself, endorsed and then cashed at two banks, there was sufficient evidence from which to conclude that the defendant forged the signatures of the maker on the checks and, as a consequence, the evidence was also sufficient to show, for purposes

of the crime of uttering, both that the checks were forged, and that at the time the defendant cashed them, he knew or believed that they were forged; further, with respect to the crimes of forgery and uttering, the evidence was sufficient to show that the defendant acted with an intent to injury or defraud someone when he forged and uttered the checks, and w/ respect to all three crimes with which defendant was charged, the evidence showed that the defendant was not an authorized signator on either of the two accounts)

Forgery and uttering were proven despite the absence of testimony from the father that he did not sign the checks in question or from an expert that the signatures were forged where the subject checks, along with bank surveillance photographs of defendant at the banks at the time of the endorsements, had been admitted into evidence. Notwithstanding a well-reasoned dissent (Cordy, J.), which accorded with the Appeals Court's earlier reversal in this case, see Id. at 669-670, the Court held that there was sufficient evidence to show that the defendant acted with "intent to defraud" on the ground that he presented the checks for payments with signatures that he knew to be forged. "Lack of authority" is not an essential element of any of the crimes for which defendant was indicted Id. at 664.

A bank employee, given her 20 years of experience as a teller, customer service representative and vice-president in charge of security, was deemed qualified to give her opinion that the signatures on the checks did not match the father's signature even though she had witnessed his signature only once Id. at 667. Moreover, the defendant's signatures on the five checks which were admitted in evidence as genuine and submitted to the jury could be used as a standard against which the jury could compare the disputed signatures and decide the question of authorship without the need for expert testimony Id. at 662, 668.

EVIDENCE: Required finding; controlled substance, constructive possession.
(See also **PROSECUTORIAL MISCONDUCT: Closing Argument)**
Commonwealth v. Monson, 57 Mass. App. Ct. 867, 870 (2003)

(holding judge did not err in denying defendant's motion for required findings of not guilty where, despite defendant's claims that she did not know of the cocaine's presence in a key case located under the bar counter directly in front of where she was seated, jury reasonably could have inferred from evidence presented that she in fact had constructive possession of it)

EVIDENCE: Required finding; Defense of others, Assault and battery by means of a dangerous weapon
Commonwealth v. Wolmart, 57 Mass. App. Ct. 780 (2003)

(affirming defendant's conviction of assault and battery by means of a dangerous weapon [a knife with a six-inch blade], where defendant's use of the knife amounted to excessive, deadly force, unwarranted to protect her spouse from being struck by the victim's fist).

Spouses of the victim and defendant had been involved in an extramarital affair. The defendant testified that the victim had made several threats on prior occasions to kill or to "beat up" her husband and on one such occasion, he had shown her a gun and stated that it was for killing her husband. But on the night in question, when the victim approached the defendant's spouse and shouted, "I'm going to hit him," he was not armed. The defendant went into her home and returned outside with the knife. When the victim approached to "hit" the defendant's spouse with his fist, she stabbed him in the arm. In this circumstance implicating defense of another, the justification for the use of force was lost by the unwarranted use of excessive, deadly force since there was no imminent danger of death or serious bodily harm to either the defendant or to her spouse.

EVIDENCE: Required finding; Controlled substances.

Commonwealth v. Ramirez, 57 Mass. App. Ct.475, 477-78 (2003)

(charged with unlawful possession of cocaine with intent to distribute, the evidence was sufficient to permit a rational jury to infer that two unrecovered, hence untested bags of white powder, which defendant had exchanged for money and which defendant's companion had given to him from a black magnetic box, contained cocaine, where an undercover officer, when purchasing from the defendant's companion received two bags of white powder that came from that same box, had seen six other bags of white powder in the box; where the jury could infer that three bags of white powder recovered from the defendant's companion at the time of his arrest came from that box; and where the two untested bags appeared to be approximately the same weight, color, and packaging as those five bags, all of which tested positive for cocaine)

EVIDENCE: Required finding; Larceny of a motor vehicle.

Commonwealth v. Prentice, P., a juvenile, 57 Mass. App. Ct. 766, 768-770

(circumstantial evidence at the trial of a juvenile on a charge of larceny of a motor vehicle was insufficient to show that he stole the vehicle where the juvenile, with another male, was observed kneeling beside a stolen vehicle; the car had been "jacked up," with its doors and trunk open, and a tire and crowbar were nearby and when confronted by the police, the juvenile tried to flee)

The Court stated that there was "no evidence, either direct or circumstantial, that the juvenile was, at any time, in actual or even constructive possession of the stolen vehicle" Id. a t 769.

EVIDENCE: Required finding; Protective order

Commonwealth v. Habenstreit, 57 Mass. App. Ct. 785 (2003)

(defendant's former girlfriend's absence from work was a fortuitous circumstance that did not constitute a defense to the stay-away order which was not conditioned on her presence)

On a day when the complainant called in sick to work, the defendant came by her workplace, and from his truck window, while looking at his former girlfriend's new boyfriend who was inside, blew his horn several times, shouted obscenities and then made threats.

EVIDENCE: Bias, Past recollection recorded.

Commonwealth v. Evans, 439 Mass. 184, 188-189 (2003)

(although it is "ordinarily helpful for jurors to know the nature of the unresolved charges pending against a witness so that they will have some means of gauging the extent to which the witness may be biased," that the judge only permitted the witness to be impeached with the fact that he had "serious felony charges" (aggravated rape and kidnaping) pending against him, was not, in the circumstances, an abuse of discretion)

(**error** to admit in evidence the grand jury testimony of a Commonwealth witness [that he had seen the defendants at the scene of the crime] as past recollection recorded where the witness had no recollection of what he had told the grand jury and there was no evidence that he adopted his earlier testimony when his memory of the events was fresh; further, in the absence of the judge finding that the witness was feigning memory loss [when, at trial, he stated he had no memory of seeing the defendants at the scene], the grand jury testimony was not admissible for substantive purposes under the rule established in *Commonwealth v. Sineiro*, 432 Mass. 735, 741 [2000]; however, erroneous admission of the hearsay was not prejudicial where the defendants testified and admitted being at the scene) Id. at 189-191.

EVIDENCE: Loss or destruction.

Commonwealth v. Cintron, 438 Mass. 779, 785 (2003)

(defendant had shown no prejudice from the loss of the original fingerprint since the photograph of it and not the original fingerprint itself, formed the basis for identifying him and defendant's expert indicated photograph of fingerprint was "qualitatively excellent," id at 786, had it to compare with the known prints, thus defendant had access to the same information relied on by the Commonwealth)

Case is significant for two reasons: As a primer on the Automated Fingerprint Identification System (AFIS), a computerized fingerprint filing and identification system, and its reliability (here, a State Police Lieutenant arranged for the manual review of fingerprint cards on file with the Holyoke police department because, in his experience, "AFIS was not always reliable," Id. at 782) and for a reprise of the law relating to the alleged loss or destruction of potentially exculpatory evidence Id. at 784.

EVIDENCE: Vouching for credibility.

Commonwealth v. Rolon, 438 Mass. 808, 813-817 (2003)

(no improper vouching occurred where defense counsel's express attack on witness's credibility during his opening statement, by way of a misstatement as to the contents of a plea agreement, justified the prosecutor eliciting on direct examination; the contents of the plea agreement)

One of the participants in the storming of the apartment, pursuant to a plea agreement, pled guilty to being delinquent by reason of murder in the second degree and testified for the prosecution. He was the only eyewitness to testify that it was the defendant who stabbed the victim.

Twice during direct examination of the juvenile, and over objection, the prosecutor elicited that he had a plea agreement and that he had agreed to provide "complete and truthful and accurate testimony" Id. at 813.

Ordinarily, questions concerning an agreement's requirement that a cooperating witness give "truthful" testimony should be reserved for redirect examination after cross-examination has attacked the witness's credibility based on the plea agreement Id. 813, 814. Here, however, defense counsel's arguable "significant mischaracterization" of what the witness's obligation under the agreement was, opened the door to the prosecutor to elicit, on direct, the contents of the plea agreement Id. at 814.

EVIDENCE: State of mind exception

Commonwealth v. DiGiacomo, 57 Mass. App. Ct. 312, review denied 439 Mass. 1102 (2003).

(**error**, though nonprejudicial, to admit in evidence, under the state of mind exception, a teacher's testimony regarding her conversation with the defendant, in which she discussed statements made by his female students concerning his conduct where the conversation related not to any future conduct, but to past alleged sexual assaults)

The defendant, a middle school vice-principal, charged with a series of sexual assaults upon six female students, asserted that they had made up the sexual aspect of their relationship with him.

Over objection, the judge allowed a teacher to testify to the contents of her conversation with the defendant. She told him that the students had come to her to report that they felt "uncomfortable in [his] presence, and they had spoken of being hugged and being touched" by him. The defendant asked for, and was told, the names of the girls who had complained.

The judge improperly allowed the testimony in evidence for the purpose of showing the defendant's state of mind and limited its use to the indictments naming only one complainant. "Statements of a victim of a crime made prior to the event may be admissible in order to prove a motive or relevant state of mind of the defendant, if there is evidence they were communicated to the defendant." Liacos, Massachusetts Evidence §§ 8.2.2 (7th ed. 1999). Here, any statement made by the one

complainant or the other girls to the teacher did not relate to any future sexual assaults . . .; at most, they related to past alleged sexual assaults" Id. at 320. The defendant's equivocal response when confronted by the teacher did not meet a state of mind exception to the hearsay rule because his statements faced "backward." Id. at 320.

For the reasons set forth in the decision, the Court nevertheless concluded that the error "did not influence the jury, or had but very slight effect" Id. at 320-321.

EVIDENCE: Opinion testimony.
Commonwealth v. Andujar, 57 Mass. App. Ct. 529, 530-33 (2003)
(See also ADMISSIONS & CONFESSIONS)

(reversing where judge erred in admitting, over objection, the testimony of an officer that he believed that four interactions he witnessed constituted street level drug transactions)

The police officer observed five instances where an individual approached the defendant and engaged in a short conversation, following which the defendant reached into a tree for an object, and then exchanged the object for cash. After the fifth transaction, the purchaser was apprehended and was found to have cocaine. The defendant had $375 in his pocket. During the prosecution's direct examination of the officer, notwithstanding the clear admonition of *Commonwealth v. Woods*, 419 Mass. 366, 374-375 (1995), and its progeny, the judge admitted testimony that the officer believed that the four interactions that preceded the fifth transaction to be street level narcotics transactions. The examination was not even couched in the approved "consistent with" locution. See *Commonwealth v. Johnson*, 410 Mass. 199 202 (1991). The Court concluded that the opinion improperly intruded upon the jury's fact-finding function.

EVIDENCE: Relevancy & materiality; sexual conduct; new trial.
Commonwealth v. Owen, 57 Mass. App. Ct. 538 (2003)

(defendant was entitled to an evidentiary hearing on his motion for a new trial where he demonstrated his trial counsel had information that, if deemed admissible, could have shown that the young victim had acquired her knowledge of the sexual matters to which she testified from past acts of similar sexual abuse committed by another)

In fairly graphic detail, the victim, who was ten at the time of trial, claimed that when she was between five and nine years of age, she was abused by her biological father during overnight and weekend visits with him.

Her delay in making any contemporaneous complaint, she claimed, was due to her lack of understanding about what the defendant was doing to her. Once she comprehended the nature of his acts, she told her sister and mother. The mother notified the police, and the victim was interviewed by law enforcement authorities and examined by medical professionals. The two physicians who examined her reported to the effect that their examinations revealed no specific physical findings of sexual abuse or evidence of trauma.

The testimony that most undermined the Commonwealth's case came from the victim's "best friend," a cousin. Although the cousin testified that the victim told her that she was not seeing her father, "because he had sex with me," the cousin also testified that the victim immediately thereafter told her that the accusation was a lie and swore her to secrecy. Upon cross- examination, the cousin testified that the victim told her that she hated the defendant and "just wanted to get him in trouble."

In closing, the defendant argued that the victim had concocted her allegations because she was jealous and resentful of the defendant's attention to his dog. The prosecutor told the jury that they had to

decide -- had the victim been sexually abused and was the defendant the abuser. As to the first, the prosecutor stressed that the victim could not have knowledge of the sexual acts about which she testified had she not been abused.

The motion for a new trial set out information in support of the allegation that trial counsel as well as counsel on the direct appeal knew or should have known that the victim could have acquired her knowledge of the sexual matters about which she testified from sources other than the alleged acts of abuse by the defendant; rather, from information concerning past abuse of the victim never made known at trial or on the direct appeal.

Relying on *Commonwealth v. Ruffen*, 399 Mass. 811, 814-816 (1987) and its progeny, trial counsel filed a motion in limine by which he sought to introduce in evidence a report made by DSS which. he claimed, "proved that the [victim] was previously exposed to sexual abuse." And he offered additional information concerning prior sexual abuse of the victim.

Ruffen sets out a two-step process for a determination concerning the admissibility of evidence of prior sexual abuse to show that the victim could have acquired knowledge of sexual matters and terminology from that abuse that could account for her testimony at trial. The first step requires some showing of "a reasonable suspicion and a good faith basis" for seeking permission to question the victim about prior sexual abuse. If the defendant makes the requisite showing, he is entitled to a voir dire examination to determine whether the victim "had been sexually abused in the past in a manner similar to the abuse in the instant case" Id. at 815.

According to the information available to trial counsel at the time of his motion, he had in his possession various police reports as well as reports from the DSS which showed that when two years old, the victim saw her mother and a male friend in bed and, at that time, she engaged in play with anatomically correct dolls in a sexual manner; that when the victim was four or five years of age, an adolescent relative touched sexual parts of the victim's body and inserted his penis into her mouth while telling her how the penis would feel; and that another adolescent put his hands inside her shirt and felt her breasts and fondled her.

This information was sufficient to satisfy the first step. The Court held that trial counsel was therefore ineffective for not pursuing the motion after the trial judge had deferred ruling on the matter and that he would have been entitled to a voir dire.

It held further that evidence of prior sexual abuse similar to that alleged against defendant could only have bolstered his defense that the victim was fabricating the charges.

Noteworthy is that the Appeals Court stated that nothing in either *Ruffen* or *Commonwealth v. Rathburn*, 26 Mass. App. Ct. 699, 707 (1988) mandates that the evidence of prior sexual abuse of the victim be identical to or the same as that of which the defendant stands accused. Rather, the Court reads *Ruffen* and its progeny to hold that for any evidence of prior sexual abuse adduced at the voir dire to be admissible at trial, that evidence must show only that the prior abuse was sufficiently similar to the present allegations to account for the victim's knowledge of the matters comprehended. Id. at546-547. See *Commonwealth v. Scheffer*, 43 Mass. App. Ct. 398 (1997).

EVIDENCE: Expert Opinion, DNA

Commonwealth v. Rocha, 57 Mass. App. Ct. 550 (2003)

(In a rape trial, the judge did not abuse his discretion in admitting expert evidence, derived from the results of DNA paternity tests that placed defendant's *probability of paternity* of the victim's fetus at 99.7 per cent [Commonwealth's expert] or at 98.3 per cent [defendant's expert] where the evidence was relevant to the determination whether defendant had had sexual intercourse with the victim)

The evidence was that only two men had the opportunity to impregnate the victim: the defendant, who was the victim's brother, and her father. DNA test results excluded the father.

The calculations on which the probability determinations were based were explained in detail and the defendant did not challenge the reliability of the statistical methodology. A description of the scientific methodology underlying paternity tests that establish "the impossibility of the accused's paternity . . . to a medical certainty" is contained in *Commonwealth v. Beausoleil*, 397 Mass. 206, 209-210 (1986).

Noteworthy is that the probability of paternity estimate assumes a fifty percent likelihood or probability that the defendant engaged in sexual intercourse with the victim Id. at 558 & n.12 In other words, the probability of paternity statistic did not rely on evidence of intercourse, but assumed for purposes of the mathematical calculation that the defendant was equally likely to be the father as not to be the father.

The Court held that there was no error in the trial court's refusal to instruct the jury that the probability of paternity statistic could not be used as evidence that the defendant had intercourse with the victim where the judge instructed the jury that they were not to substitute the probability of paternity estimate for the standard of proof beyond a reasonable doubt Id. at 560.

EVIDENCE: Consciousness of Innocence

Commonwealth v. DoVale, 57 Mass. App. Ct. 657, 661-663 (2003)

(no error in refusing to admit, as evidence of consciousness of innocence, a refusal to accept a motion judge's proffer of a plea bargain to "time-served")

The Court construed Mass.R.Crim.P. 12(f) which expressly declares inadmissible the offer to plead guilty and says nothing about the admissibility of evidence of a refusal so to do "to state the larger proposition, that a statement made in connection with a proposal for a plea shall not be evidence at trial" Id. at 662. Here, the Court stated that there could be many reasons why defendant did not accept the offer apart from whether he was, in fact, innocent.

EVIDENCE: Restitution

Commonwealth v. Williams, 57 Mass. App. Ct. 917, 917-918

(nothing requires victim submit a claim under any insurance policy that might cover the loss before an order of restitution could be made and the trial court could instead rely on cost estimates, submitted by the victim prepared by various vendors, rather than the actual costs for the repairs, in determining the amount of restitution to impose)

EVIDENCE: Fresh Complaint

Commonwealth v. Howell, 57 Mass. App. Ct.716, 719-726 (2003)

(reversal required due to multiple infirmities relating to use of fresh complaint evidence)

At the trial of an indictment alleging indecent assault and battery on a child under fourteen, fresh complaint evidence, with respect to "timeliness," was, for the reasons that follow, on the "borderline of admissibility." First, the complainant, although not yet an adolescent, was an intelligent preteen of considerable self-assurance (sufficient, in fact, unilaterally to terminate counseling with the defendant at age eleven). Second, there was no evidence that the defendant ever threatened, coerced, or intimidated the complainant. Third, the defendant's control over the complainant was minimal at best, evidenced by the complainant's unilateral decision at age eleven to terminate counseling with the defendant and his resistance to the defendant's efforts to resume it. Fourth, even assuming the defendant's position as a school counselor is considered supervisory, complainant was out from under such "control" for eight

months prior to reporting the incidents. Finally, the complaint was not spontaneous, but rather occurred during the course of a grilling administered to him by his mother and grandmother on the subject of his own misbehavior, thus the disclosure was not "triggered by an event, or a change in circumstances, that invests [it] with spontaneity and plausibility;" rather, the circumstances "ma[d]e it seem . . . more in the nature of the calculated use of the complaint as a weapon in the course of a vitriolic quarrel."

Where the judge failed to give contemporaneous instructions on the use of fresh complaint evidence before two fresh complaint witnesses (complainant's mother and grandmother) testified, gave an inadequate instruction during break in a third fresh complaint witness's testimony (chief investigator from the District Attorney's office who recounted details of the unrecorded SAIN interview) and gave incomplete final instructions to the jury, the risk of prejudice arising from the multiple fresh complaint witnesses was not alleviated.

In a case entirely dependent on the credibility of the complainant, the above infirmities, combined with the improper admission of the complainant's self-corroborating testimony via a videotaped interview, not accompanied by any mitigating factors, required reversal.

INEFFECTIVE ASSISTANCE OF COUNSEL

See Defenses: Insanity; *Commonwealth v. LaCava*, 438 Mass. 708, 712-716 (2003)

JURY INSTRUCTIONS: Joint venture felony-murder

Commonwealth v. Netto, 438 Mass. 686, 704-707 (2003)

(See also EVIDENCE: Required finding; Joint venture; and Search & Seizure: Probable cause; expectation of privacy, abandonment)

Case is noteworthy for the judge's supplemental instruction on joint venture felony-murder where the judge informed the jury that the killing had to be "incidental to and the natural and probable consequence of the armed robbery." See *Commonwealth v. Nichypor*, 419 Mass. 209, 215 (1994). He specifically advised the jury that "in order for the killing to be incidental to and a natural and probable consequence of the nonstabber's participation in the armed robbery, the killing must have taken place during a *single logically related continuing criminal transaction* at a time when the nonstabber was actively involved as a participant in the armed robbery" (emphasis added). He then articulated further that, if a joint venturer in an armed robbery "was no longer actively involved and the killing took place after the nonstabber was no longer actively involved in committing a crime, then the nonstabber is not guilty of armed robbery felony murder." He also instructed the jury that if the joint venturer did not become involved until after the victim had already been killed, the joint venturer would not be guilty of armed robbery or of any form of murder. In considering these issues, the judge instructed the jury to consider several factors: whether there was "a break in the logical chain of events" between the robbery in which the joint venturer was involved and the killing, whether there was "a separation of an appreciable amount of time" between the robbery and the killing, and whether the killing "occurred at a place that was different and separate from the nonstabber." Id. at 706 n.19.

JURY INSTRUCTIONS: Note taking

Commonwealth v. Dykens, 438 Mass. 827, 830-835 (2003)

(no abuse of discretion where judge allowed jurors to take notes during the second portion of the charge, which explained the elements of the offenses involved and principal-joint venture liability, but not during the first part of the charge, which dealt with standard instructions and described rules of law and principles such as the presumption of innocence, proof beyond a reasonable doubt and inferences)

The defendant argued that the notetaking procedure used by the judge "suggest[ed] to the jurors that the elements [of the offenses] were more important than the "fundamental principles of law favorable to [him]" Id. at 830. The Court, however, noted that the judge took pains to assure that no part of his charge was emphasized at the expense of another. The jurors were instructed not to consider any instruction more or less important than another or to give special attention to any instruction but to consider the charge as a whole Id. at 833.

JURY INSTRUCTIONS: Joint venture; dangerous weapon.

Commonwealth v. Charles, 57 Mass. App. Ct. 595, 597-99 (2003)

(where the defendants were charged with armed assault with intent to murder on a theory of joint venture, the judge erred in failing to instruct the jury that it had to find that each knew before the shooting that an apparent accomplice had a gun)

After the defendants attacked the victim, the victim pulled a knife and chased them off. Another person whom the defendants had spoken to shortly before the attack, seeing what had just happened, then pulled out a gun and shot the victim in the back.

The charge on joint venture possession of a firearm did not elaborate as to precisely when the defendants needed to know that the fourth man was carrying a firearm. As given, it was broad enough to suggest that the defendants need only have known about the gun at some time during which the shooter was carrying it, even if they first gained their knowledge by seeing the shooter pull out the weapon and fire Id. at 598-599.

JURY INSTRUCTIONS: Defense of others.

Commonwealth v. Kivlehan, et al 57 Mass. App. Ct. 793, 795-796 (2003)

(judge's failure to give jury instruction on defense of another, though not specifically requested, but was plainly the theory of defense, created a substantial risk of a miscarriage of justice)

A mother, son, and daughter were convicted of assault and battery and other crimes after the daughter got into a fight with her boyfriend's ex-girlfriend outside the daughter's home. The daughter "was getting her 'ass kicked,'" by the ex-girlfriend so she retreated towards her house as the ex-girlfriend advanced, joined by several other women. The mother and son joined the fray. They pushed the ex-girlfriend inside their home, where the fight continued. Others then entered the home and dragged the ex-girlfriend outside.

A defense of others instruction is appropriate where the evidence, viewed in a light most favorable to the defendant, supports the argument that (1) a reasonable person in the defendant's position comprehends his or her intervention is necessary for the protection of the third person and (2) in the circumstances as perceived by that reasonable person, the third person would be justified in using such

force to protect himself. [citation omitted]. Where the facts of the case permit, a judge is required to instruct on that theory even in the absence of a request from the defendant Id. at 795. Moreover, "once a claim of self-defense or defense of another is viably woven into the evidentiary tapestry, the burden shifts to the Commonwealth to disprove such affirmative defense. [citation omitted]. The record in this case satisfie[d] that imperative Id. at 796.

The Court held that the facts herein raised the issue of whether the mother and son's use of force against the ex-girlfriend was justified under the circumstances.

JURY SELECTION: Peremptory challenges, Race *and* gender.

Commonwealth v. Jordan, 439 Mass. 47, 57-62 (2003)

(art. 12 proscribes the use of peremptory challenges to exclude prospective jurors by virtue of their membership in a group delineated by race *and* gender)

The Court found a pattern of exclusion of a combined race-gender group (white males) from the jury Id. at 57. The question was whether the protections against the improper use of peremptory challenges extend to groups delineated not just by one of the affiliations protected in *Commonwealth v. Soares*, 377 Mass. 461 (1979), but by the intersection of two of them: race and gender. In other words, is the use of a peremptory challenge to exclude a juror solely on the basis of bias presumed to derive from that juror being, for example, a white male or a black female forbidden by the principles enunciated in *Soares*.

Although the United States Supreme Court has not yet confronted the question whether the Federal constitutional protections afforded race-based groups in *Batson v. Kentucky*, 476 U.S. 79, (1986), and gender-based groups in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, (1994), extend to combined race-gender groups, lower Federal courts addressing the issue have generally declined to recognize such groups as being protected from discrimination in the jury selection process by the United States Constitution Id. at 59 (citations omitted). In contrast, those State courts that have wrestled with the issue under their own Constitutions and precedent have generally recognized the existence of combined race-gender groups as discrete groups deserving of protections similar to those extended to discrete groups defined exclusively by race or gender Id. at 60 (citations omitted).

Our Supreme Judicial Court decided that it would be an anomaly and inconsistent with the primary end of ensuring an impartial jury and a fair trial to conclude that the protection afforded to groups defined by race *or* gender against impermissible exclusion from jury panels ought not extend to groups defined by race *and* gender Id. at 59, 62.

JUVENILE: Youthful offender.

Commonwealth v. Lamont L., a juvenile, 438 Mass. 842 (2003)

(reversing the Appeals Court, see 54 Mass. App. Ct. 748, 754 [2002], the Supreme Judicial Court held that in circumstances in which the Commonwealth properly indicted the defendant as a youthful offender on a charge of assault and battery by means of a dangerous weapon, but improperly joined a companion indictment on a misdemeanor charge of assault and battery and, after trial, the defendant was adjudicated a youthful offender on the misdemeanor charge, the proper remedy was not to vacate the misdemeanor adjudication and dismiss the indictment; rather, it was to order the entry of a delinquency finding on that misdemeanor offense).

The youthful offender statute allows the Commonwealth to proceed by means of indictment against a juvenile only for those offenses "which, if he were an adult, would be punishable by imprisonment in the state prison." G. L. c. 119, §54. Assault and battery is not such an offense. The Commonwealth therefore should have proceeded on this offense by complaint and not indictment. Nevertheless, the defendant was given full notice of the offense against him and had the opportunity to defend against it. The inclusion of the additional improperly brought allegation that subjected him to punishment as a youthful offender did not prejudice his defense to the underlying charge. Because the two offenses properly could be joined, there was no prejudice to defendant in the trial procedure Id. at 843-844.

PRACTICE: Motion for reconsideration; abuse of discretion.

Commonwealth v. Haskell, 438 Mass. 790 (2003).

(It was not an abuse of discretion for the motion judge, without hearing further evidence, and after a five-year hiatus resulting from the defendant's default, to reverse his initial position denying the defendant's motion to suppress evidence, to then allow his motion to reconsider and to allow the motion itself,)

A judge may permit a motion that has been heard and denied to be renewed when "substantial justice requires." Mass. R. Crim. P. 13 (a)(5). Although renewal "is appropriate where new or additional grounds are alleged which could not reasonably have been known when the motion was originally filed," Reporters' Notes to Rule 13, the remedy is not restricted to those circumstances. A judge's power to reconsider his or her own decisions during the pendency of a case is firmly rooted in the common law, and the adoption of rule 13 was not intended to disturb this authority Id. at 792.

PROBATION REVOCATION: Admission to Sufficient Facts

Commonwealth v. Bartos, 57 Mass. App. Ct. 751, 754-57 (2003)

(defendant's appeal from revocation of his probation could not be dismissed on grounds of mootness where, after the revocation proceeding, in a separate criminal case for assault and battery on a court officer, which was also the basis for the revocation, the defendant admitted to sufficient facts to warrant a finding of guilty but then had his case continued without a finding)

The rule of *Commonwealth v. Fallon*, 53 Mass. App. Ct. 473 (2001), does not control in this unusual situation. *Fallon*, in effect, provides that a criminal conviction based on the higher, beyond a reasonable doubt standard of proof, "submergers" any residual negative consequences of a probation revocation based on the same offense since the standard of proof in the latter proceeding is by a mere preponderance of the evidence, thus rendering "purely academic," questions concerning the validity of the revocation.

Here, however, the defendant was neither tried in a criminal proceeding and found guilty nor did he plead guilty; rather, he admitted to sufficient facts and had his case continued without a finding. The Court therefore held that it would be improper to construe the admission to facts in this situation as the "functional equivalent" of a guilty plea since the admission was not followed by a finding of guilt and a sentence for the breach. See *Commonwealth v. Villalobos*, 437 Mass. 797, 802 (2002) ("An admission to sufficient facts followed by a continuance without a finding is not a 'conviction' under Massachusetts law").

PROBATION REVOCATION: Confrontation of witnesses, Hearsay.

Commonwealth v. Cates, 57 Mass. App. Ct. 759 (2003)

(permitting hearsay [a segment of a SAIN interview] as the sole evidence to prove a violation of probation)

Rule 6(b) of the District Court Rules for Probation Violation Proceedings provides in pertinent part that "where the sole evidence submitted to prove a violation of probation is hearsay, that evidence shall be sufficient only if the court finds in writing (1) that such evidence is substantially trustworthy and demonstrably reliable and (2), if the alleged violation is charged or uncharged criminal behavior, that the probation officer has good cause for proceeding without a witness with personal knowledge of the evidence presented."

In this instance, the hearsay, which the trial judge found to be reliable and trustworthy, was fourteen minutes of the fourteen year old complainant's unsworn statement made during a videotaped sexual assault intervention network interview. The Appeals Court noted, but was not persuaded to the contrary by the countervailing fact that the complainant was not a "disinterested witness," nor by the fact that there were unreconciled and significant discrepancies between the complainant's SAIN interview and her later statements regarding the sexual assault.

The Court did agree with the defendant that "an allegation of sexual assault does not, ipso facto, [constitute] 'good cause' to dispense with the defendant's right to cross-examine the witness." Nevertheless, based on no more than that the police officer testified that the complainant was upset and crying during the SAIN interview, the Court held the facts sufficient to support the judge's conclusion that testifying would have been unduly stressful to the complainant.

PROSECUTORIAL MISCONDUCT: Improper cross-examination & closing argument

Commonwealth v. Hrabak, 57 Mass. App. Ct. 648, 653-655 (2003)

(in a trial involving two counts of rape and one count of indecent assault and battery, error occurred in prosecutor's argument with respect to the alleged anal rape of one victim when the prosecutor misstated the evidence and urged jury to speculate on a matter beyond their common experience).

The defendant contended that the victim could not have been raped because his pediatric records, introduced as an exhibit, failed to show that he had suffered any injury in his rectal area.

During cross-examination of a trained sexual assault police investigator, defense counsel asked whether the absence of any indication in victim's pediatric records of injury to his rectum might indicate that the rapes had never happened. The officer responded: "It might have showed it. It might not have showed it. I'm not an expert." Thereafter, on redirect, the officer testified that her training taught her that children "may" or "may not" sustain injuries if their "genital areas are penetrated." The misstatement occurred when the prosecutor argued that the officer testified that "sometimes when children experience genital penetration, *such as anal penetration,* ... they have injuries, and sometimes they don't."

The officer did not testify that a child's rectal area might be penetrated by a hard object and not show any injury. Rather, she stated only in the most general and unspecific manner that children may not sustain injuries if their "genital areas" are penetrated.

The improper invitation to speculation occurred when the prosecutor urged the jury to keep in mind that a child's rectum was "flexible enough to accommodate the passage of fairly-large objects," viz.,

a male's penis without showing any injury.

This was a medical matter plainly beyond the common knowledge of the ordinary layperson and, hence, expert testimony was required before the jury could draw any inference with respect to it.

Noteworthy is that though defense counsel did not introduce any expert testimony before urging the jury to infer from the absence of physical injury to victim's rectal area that no rape had occurred, the Court stated that the prosecutor should have anticipated this argument and been prepared to present expert testimony to meet it.

PROSECUTORIAL MISCONDUCT: Improper cross-examination & closing argument

Commonwealth v. Monson, 57 Mass. App. Ct. 867, 871-872 (2003)

(at a trial charging possession of cocaine with intent to distribute, the prosecutor's suggestion to jury during **closing argument** that police had received a tip from an informant or other information that defendant was selling drugs before they entered the bar in which they found cocaine in a key box attached to the counter in front of where defendant was seated, was improper and created a substantial risk of a miscarriage of justice in that the argument could have influenced the verdict)

The judge had ruled no less than four separate times that the Commonwealth was barred from presenting any evidence, including through the "back door," that when he entered the lounge and attempted to purchase cocaine from the defendant, the undercover officer was acting on a tip from an informant or other information the police had received Id. at 872. See also Id. at 868-869 .

In his closing argument, the prosecutor repeatedly asked the jury whether it was a "coincidence" that the undercover officer entered the bar, went directly to the defendant and asked her for a "twenty, " or whether it was a "coincidence" that when the other officers subsequently come in, they too went directly to the defendant, confronted her, and in a subsequent search, found cocaine exactly where she was sitting.

Although the prosecutor never uttered the word"informant," the Court held that his statements strongly implied that the police were "in fact acting on a tip from an informant or other information the[y] had received when [they] entered the lounge" Id. at 872.

PROSECUTORIAL MISCONDUCT: Improper cross-examination & closing argument

Commonwealth v. Rodriguez, 57 Mass. App. Ct. 368, 373-376 (2003).

(prosecutor's cross-examination of defendant about complaining witness's practice of placing a Bible in every window of her house and mentioning this fact in his closing was intended neither to appeal to the jury's religious beliefs nor to bolster the witness's credibility; rather, it was to emphasize her simplemindedness).

Addressing the jury, the prosecutor said and repeated that the witness seemed to bear herself as a simple and sincere person, thus unlikely to have fabricated the awful accusation against the defendant. In support of these characterizations of the witness, the prosecutor spoke of the Bible display

Fed.R.Evid. 610 and the corresponding Proposed Mass.R.Evid. 610 provide as follows. "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature [the witness's] credibility is impaired or enhanced." The Court stated that "[i]n the spirit of the admonition and with due regard to the treacherousness of the general terrain, the prosecutor would have done better to omit his bits of bravura." Id. at 374. However, the Court did not

find that this cross-examination and closing created a substantial risk of a miscarriage of justice. It regarded the prosecutor's purpose being not to appeal to "religious fervor," or to be saying that "anybody who has a Bible couldn't make up the story" Id. at 373, 374 n.9; rather, it stated that the Bible display was mentioned to show how simpleminded the witness appeared to be I.d. at 375.

PROSECUTORIAL MISCONDUCT: Improper cross-examination & closing argument
Commonwealth v. Rupp, 57 Mass. App. Ct. 377, 385 (2003)

(See also SEARCH AND SEIZURE: Reasonable suspicion; Threshold police inquiry)

(in urging that the jury could rely on circumstantial evidence, the prosecutor's example, namely, that the jurors might conclude beyond a reasonable doubt that it had been raining by observing puddles all over the pavement after they had been inside all day, tended to trivialize the concept of reasonable doubt and, hence, was improper).

PROSECUTORIAL MISCONDUCT: Improper cross-examination & closing argument
Commonwealth v. Murphy, 57 Mass. App. Ct. 586, 588-591 (2003)

(prosecutor's degrading question during defendant's cross-examination was improper, but since it was an "aberrant" departure from an otherwise properly conducted cross, the error did not create a substantial risk of a miscarriage of justice)

The seven-year old rape complainant was the son of the D's fiancee. Near the end of the prosecutor's cross-examination of defendant, the prosecutor asked, "How did it feel when you were sucking your son's penis?" Defendant denied that it happened and stated that it was vulgar of the prosecutor to say that.

The Appeals Court stated that "how the defendant 'felt' had no bearing on his guilt or innocence. . . [T]he question was one that, given all that had gone before, no reasonable prosecutor could have expected to produce an answer helpful to the Commonwealth's case. Instead, reasonably viewed, the question could do nothing more than degrade" Id. at 589. "Trials are a search for truth, not socialized stonings. Consequently, witnesses must not be subjected to 'questions [that] go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate'" Id.

SEARCH & SEIZURE: Eavesdropping, telephone conversation.

Commonwealth v. Ennis, 439 Mass. 64, 67-70 (2003)

(an audiotape recording by the Department of Correction of a three-way telephone conversation among an inmate at a house of correction, a criminal defendant, and his codefendant should not have been suppressed where, though the communication was an "interception" as defined in G.L. c. 272, sec. 99 B 4, the DOC did not wilfully record the inmate's call to the codefendant, announcing to both parties that their conversation would be recorded and affirmatively seeking to prevent any additional party from being added to the two-party conversation; where, by some means, the codefendant managed to bypass the feature intended to exclude any additional party from the conversation; and where the DOC did not wilfully or secretly record the communication and there was nothing to indicate that the Commonwealth was culpable, or even negligent; rather, that it was due to the codefendant's misconduct, no deterrent purpose would have been served by suppressing the intercepted conversations)

SEARCH & SEIZURE: Warrant; Multiple occupancy building.

Commonwealth v. Dominguez, 57 Mass. App. Ct. 606, 609-611 (2003)

("where the officers who applied for, and executed, the [search] warrant did not know or have reason to know that the building was not a one-family dwelling," the motion to suppress evidence seized in execution of the warrant that misidentified the home as a single-family, was properly denied)

"The burden [is] on the defendant[], . . . to show that the police reasonably should have known that there were two separate apartments in what appeared to be a single-family house.

In this case, when viewing the house from the front, there was nothing to indicate that it was anything other than a single-family dwelling. It had one front entrance with a single number on it. The possible indicia of multiple occupancy also were not present: multiple mailboxes, doorbells, marked parking spaces, and gas or water meters. The Court held that the officers did not have to risk disclosure of their surveillance or jeopardize their investigation by an earlier approach to the rear, or inside, of the dwelling, which is the only practical way they would have realized their mistake.

SEARCH & SEIZURE: Probable cause, exigent circumstances.

Commonwealth v. Molina, 439 Mass. 206, 208-213 (2003)

(error to deny D's motion to suppress where, though the police had probable cause to arrest the defendant by virtue of the complainant's report that he had raped her, exigent circumstances did not exist to dispense with first obtaining a warrant)

The police, responding to a hospital emergency call, spoke to the complainant who told them that she had been living in the defendant's apartment and that he had raped her at knife point. She then gave them the defendant's name and address. They then went there to arrest him. When the defendant opened the door, the officer stepped inside, handcuffed him and told him that he was under arrest. The police then moved about the apartment making observations (of a knife and a sheath) and took a statement from the defendant Id. at 207.

The Court stated that "there is no evidence in the record explaining why the officers neglected to secure a warrant. The Commonwealthonwealth offer[ed] no evidence supporting any risk of flight, and to the extent that was a concern, nothing prevented the placement of an officer at the premises while a warrant was secured. Additionally, there was no concern regarding destruction of evidence, or any evidence that delay would subject the officers to physical harm" Id. at 210.

SEARCH & SEIZURE: Arrest; Probable cause, Consent.

Commonwealth v. Kipp, 57 Mass. App. Ct. 629, 631-632 (2003)

(seizure of the defendant's keys when he was arrested on drug and firearm charges was permissible where the keys were potentially evidence of the crime for which the arrest had been made)

Fearing that she might be implicated, an individual reported to and showed the police guns and drugs that the defendant stored at her apartment. In a search incident to arrest at his home, the police seized the defendant's keys.

The Court determined that it was unlikely that the defendant would store contraband at another's apartment without a means of access to it, hence the police could reasonably view th set of keys as likely containing keys to that apartment. In fact, the individual identified the keys as those to her apartment.

The Court also held that if a protective sweep by the police of the defendant's residence, during which a money bag was observed, was illegal, the defendant's later consent to search the premises was not materially influenced by observance of the bag. The taint of the prior unlawful entry dissipated by the time defendant consented. The defendant was motivated to consent by knowing drugs were not at his residence, and the absence of drugs there would remove suspicion from his wife. Neither the defendant's custody, when he consented, nor anything said by the officer who received the consent (that if he consented to a search in lieu of a warrant, the police would show a little courtesy and not be destructive; otherwise, if drugs were found on the premises, his wife would also be arrested), required a different result.

SEARCH & SEIZURE: Warrantless search; Probable cause.

Commonwealth v. Brown, 57 Mass. App. Ct. 326 (2003)

(warrantless search of a shopping bag found by the police at defendant's feet after she entered a common hallway in an apartment building where was staying and which resulted in seizure of a large bag of cocaine, was justified as a search incident to a lawful arrest even though the search preceded the formal arrest, where, on the basis of informant's having satisfied the test as to reliability [*Aguilar*] and basis of knowledge [*Spinelli*], and informant's detailed tip was corroborated by police observations, warranted the conclusion that there was probable cause to arrest defendant independent of results of the search).

SEARCH & SEIZURE: Police Roadblock; Reasonable suspicion.

Commonwealth v. Grant, 57 Mass. App. Ct. 334, 335-341 (2003)

(an emergency roadblock aimed at apprehending a fleeing, dangerous suspect, was reasonable and did not require individualized suspicion where the seizure constituted a minimal intrusion upon driver's right to privacy, an interest that was outweighed by a "pressing public purpose")

Police reported to a neighborhood after receiving several reports of multiple gunshots. The scene was described as chaotic, with at least 50 people milling about and spent shell casings present outside the house that was the apparent epicenter of the disturbance. Officers were ordered to stop all vehicles leaving the scene and to question the occupants. The car in which the defendant and three other men were traveling was the third in a line of ten to fifteen cars that had been stopped. An officer, believing his own safety would best be preserved if he questioned the occupants separately, asked the driver to exit and proceeded to question him. He next asked the front seat passenger to exit and, as he did, he noticed the butt end of a firearm (an M38 semiautomatic pistol with a defaced serial number) beneath the front passenger seat. He then ordered the two rear seat occupants (one of whom was the defendant) to exit. All were then patted down, handcuffed, and arrested since none acknowledged ownership of the gun.

The defendant also failed to rebut the inference raised by G. L. c. 269, § 11C that possession of firearm with a mutilated or obliterated serial number was prima facie evidence that the statute had been violated by the possessor, thus defendant's motion for a required finding of not guilty was properly denied.

SEARCH & SEIZURE: Affidavit; Probable cause.

Commonwealth v. Smith, 57 Mass. App. Ct. 907, 907-909 (2003).

(reversing motion judge's denial of defendant's motion to suppress evidence obtained from a search warrant on grounds that the affidavit, after excision, did not establish probable cause to search

defendant's home where observations by police of the defendant driving, either to or from his home, without more, established no connection between his home and the controlled buys)

The redacted affidavit described three controlled buys of marijuana from the defendant during several weeks leading up to his arrest, all at locations other than his residence. After the first buy, the defendant was observed driving his auto to his home. And before the third buy, he was observed driving from his home directly to the parking lot where the buy took place.

The requirements that pertain to applications for search warrants in drug cases such as the present are set forth in *Commonwealth v. Chongarlides*, 52 Mass. App. Ct. 366, 369-371, (2001). Here, it is sufficient to state that the affidavit supporting the search warrant request must demonstrate that there is probable cause to believe that drugs or related evidence will be found in the defendant's residence, the location to be searched. There must be "specific information in the affidavit which ties the defendant's residence to illegal drug transactions, other than that he lived at those premises." *Commonwealth v. Olivares*, 30 Mass. App. Ct. 596, 600 (1991).

The "fundamental flaw" in the affidavit in this case is that it did not explain why there was probable cause to believe that drugs or related evidence would be found at defendant's residence.

The confidential source cited in the affidavit did not indicate that the defendant either conducted drug transactions from his home or that he kept drugs there.

The Appeals Court found that the particulars in this case were "less telling than the particulars in *Commonwealth v. O'Day*, 56 Mass. App. Ct. 833," which, is borne out by the fact that the SJC has allowed further appellate review in *O'Day*, but denied it in this case.

SEARCH & SEIZURE: Reasonable suspicion; Threshold police inquiry.

Commonwealth v. Rupp, 57 Mass. App. Ct. 377, 380-82 (2003)

(police officers encountering defendant made "no show of authority" before he commenced to flee: the flight, combined with the officers' personal observations confirming many of the details of a citizen's report that defendant and his companion were engaged in a gun transaction late in the evening in a high crime area, were enough to give them reasonable suspicion to believe that the defendant was engaged in criminal activity)

SEARCH & SEIZURE: Probable cause.

Commonwealth v. Fernandez, 57 Mass. App. Ct. 562, 564-67 (2003)

(evidence was sufficient to show that the police had probable cause to arrest the defendant where they could reasonably think that as a passenger sitting in a parked car from which drug sales were solicited by a third person moving back and forth from the car, the passenger was also involved)

It did not require an "impermissible exercise of the imagination to think that a passenger, sitting in a parked car from which drug sales were solicited by a runner . . . was involved with the unlawful transaction" Id. at 566. The police could reasonably think that someone engaged in this high risk business would not tolerate the presence of someone in the vehicle who was unconnected to the business being conducted. Id. at 567. The Court distinguished the two cases on which the defendant relied in support of her "mere presence" defense, namely, *United States v. Di Re*, 332 U.S. 581 (1948) and *Commonwealth v. Sampson*, 20 Mass.App.Ct. 970 (1985). See Id. at 564-565.

SEARCH & SEIZURE: Probable cause; expectation of privacy, abandonment.

Commonwealth v. Netto, 438 Mass. 686 (2003)

(a police search of a motel room in which certain items were noticed while the defendants were present but not seized until they were removed was still a valid search incident to arrest where the police had probable cause to believe that the items were evidence of the crimes; in addition, the defendants failed to establish there was a "search" of the room in a constitutional sense when motel personnel called them the next day to ask the police to retrieve other items from the room; defendants no longer had a reasonable expectation of privacy with respect to the items left in the room that had been abandoned due to their arrest on murder charges)

Defendants, who were drug addicts with no money or assets, lived in an apartment next to the victim, who operated a restaurant and was known to have lots of cash and jewelry. They were convicted of stabbing him to death based on substantial evidence which included incriminating remarks and observances from neighbors and other witnesses, identifiable blood samples, and footprints and fingerprints. Following the stabbing, the defendants checked into a motel. Based on what they knew, the police obtained arrest warrants for them and a warrant to search their apartment. Later, the police found and arrested them in the motel room. Among the items in their possession at the time were jewelry and a large amount of cash, including ten one hundred dollar bills, three of which had spots of blood on them.

The motion judge had held that the seizure of the items at the time of the defendants' arrest exceeded the permissible scope of a search incident to arrest because the seizure was effected after the defendants had already been handcuffed and taken out of the room. The Court disagreed, stating that "[w]hile the need for the incident-to-arrest exception is indeed grounded on the need to protect law enforcement officers and evidence, the validity of such a search does not end at the instant the risks justifying the search come to an end" Id. at 695. It relied on the bright line rule it set out in *Commonwealth v. Madera*, 402 Mass. 156, 160-171 (1988), to permit the police, even in the absence of exigent circumstances, to seize and search the immediate personal possessions (bag, pocketbook, and clothing) of the two suspects arrested on a warrant, where those possessions were near at hand in the room where the arrests occurred, and where the police had probable cause to believe that the items contained evidence of the crimes for which the arrests were being made Id. at 696.

The more outrageous part of the Court's opinion involves the seizure the next day of items left in the room . The Court agreed that it could not be justified as a search incident to arrest. By that time, however, the Court concluded that the defendants no longer had a reasonable expectation of privacy Id. at 697; rather, that they had relinquished any such expectation when they "abandoned" the room -- the abandonment due, of course, to their arrest on murder charges. The fact that their "premature departure from the hotel was involuntary" did not trouble the Court which stated that it is the fact of abandonment, not the circumstances that gave rise to it that matters Id. at 698.

SENTENCING: Concurrent state and federal sentences

Abrahams v. Commonwealth, 57 Mass. App. Ct. 861, 862-865 (2003)

(in the absence of a statutory prohibition, a Superior Court judge could lawfully order that a State prison sentence [a three and one-half to four year sentence for assault and battery by means of a dangerous weapon] commence "forthwith" and be served concurrently with a Federal sentence, notwithstanding that the prisoner was in Federal custody [inmate was then in his 14th month of a 24-month federal sentence

and his 11th month of a 15-month Massachusetts house of correction sentence being served concurrently with the former] and not actually transported and delivered to the State prison facility until a later date)

STATUTE: Construction; Disorderly person, "Public" place.

Commonwealth v. Mulvey, 57 Mass. App. Ct. 579, 582-585 (2003).

(reversing conviction for disorderly conduct where there was insufficient evidence to prove the "public" element of the offense where the offensive conduct took place on purely private property and there was no showing that the disturbance "had or was likely to have had an impact upon persons in an area accessible to the public," thus, the defendant's conduct could not be found to have created the substantial and unjustifiable risk of public nuisance that was the sine qua non of the offense)

When three police officers presented themselves at the driveway of defendant's mother's house to serve him with an out-of-state restraining order, the defendant became distraught, walked back and forth and shouted at the police that they should leave his property. When their attempt to persuade the defendant to come out failed, one officer breached the fence opening and proceeded up the driveway. He tried to hand the defendant the restraining order, but the defendant refused to take it. The actions that precipitated his arrest for assault and battery on a police officer and disorderly conduct took place 30 to 55 feet up the driveway, shielded from off-premises view by a partially opaque fence.

The Court rejected the Commonwealth's argument that the public element was established by the fact that the officers were present and observed the disruption. Commentaries in the Model Penal Code recognize that behavior that has an impact only upon members of the police force is significantly different from that affecting other citizens in two respects: it is an inherent part of a police officer's job to be in the presence of distraught individuals; and, to the extent that the theory behind criminalizing disorderly conduct rests on the tendency of the actor's conduct to provoke violence in others, "one must suppose that [police officers], employed and trained to maintain order, would be least likely to be provoked to disorderly responses." Model Penal Code § 250.2 comment 7, at 350. Accordingly, police presence in and of itself does not turn an otherwise purely private outburst into disorderly conduct. "To use the officers' presence as evidence of the encounter's potential public impact, the Commonwealth would have had to prove that the spot from which they peered through the gate was a place to which the public had access" Id. at 584.

SUMMARY: <u>VIRGINIA</u> v <u>BLACK, ET AL,</u>

On April 7, the United States Supreme Court decided that the Virginia statute proscribing cross-burning was unconstitutional. See *Virginia v. Black, et al.*, 538 U.S. ___, 123 S.Ct. 1536 (2003). What rendered the statute overbroad was the provision of the model jury instruction which informed the jury that "[a]ny such burning ... shall be *prima facie* evidence of an intent to intimidate a person or group."

It would appear that this decision could have implications for the Massachusetts model jury instruction on homicide which informs the jury that it is "permitted to infer that a person who intentionally uses a dangerous weapon on another is acting with malice."

Justice O'Connor, (joined by Rehnquist, C.J., Stevens and Breyer, JJ.) writing for the Court, states that "the prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant . . . presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." 123 S.Ct. at 1551. O'Connor further agreed

with Justice Souter that the prima facie evidence provision can "**skew** jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning" Id. See also Id. At 1561 (Souter, J., concurring, joined by Kennedy and Ginsburg, JJ.). She added that "the prima facie evidence provision . . . ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate" Id. Explicating this point, Justice Souter states that "if the factfinder is aware of the prima facie evidence provision, as the jury was in [this] case . . . , the provision will have the practical effect of **tilting** the jury's thinking in favor of the prosecution. What is significant is not that the provision permits a factfinder's conclusion that the defendant acted with proscribable and punishable intent without any further indication, because some such indication will almost always be presented. What is significant is that the provision will **encourage** a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. The effect of such a distortion is difficult to remedy, since any guilty verdict will survive sufficiency review ...." Id. at 1561.

Our instruction allowing the inference of malice from the mere use of a dangerous weapons similarly skews the outcome by tilting the jury's thinking toward the prosecution and encouraging them to find malice even in those situations where the circumstances surrounding this critical element are ambiguous.